In The

Supreme Court of the United States

October Term, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

vs.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

On Appeal from the New York Court of Appeals

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

Appellant Abdiel Caban, an unmarried father, appeals pursuant to 28 U.S.C. §1257(2) from a judgment of the New York Court of Appeals (and from two orders of that court denying reargument).

In essence, on the basis of the best interests of the children, the judgment granted a petition for adoption by the natural mother and stepfather of the children over the objection of the appellant, their unmarried father.

THE DECISIONS BELOW

After granting appellant, an unmarried father, a three day hearing (378 pages of testimony), the Surrogate, in an opinion dated August 3, 1976, granted the petition of the natural mother Maria Mohammed and the stepfather Kazim Mohammed, to whom she had been married for over 2½ years, to adopt the two children David and Denise [Opinion reported at (A27-30)].

The standard applied by the Surrogate was the New York standard of "the best interests of the child." Contrary to appellant's contentions, the Surrogate did, as was required by the New York standard, consider the "fitness" and "concern", and as well the "character" of the appellant Abdiel Caban. Observing however, that since this was not an adoption by blood-strangers to the children which would require the application of New York's modified "flicker of interest rule" but instead an adoption by the mother and stepfather into an existing family unit, the Surrogate based his decision on the relative fitness and countervailing interests of the competing parents.

The New York Appellate Division, Second Department, after hearing argument, affirmed four orders of the Surrogate in a brief memorandum opinion (56 A.D. 2d 627, reported in full in Appellant's Appendix, pp. 41, 42). The Appellate Division cited as authority *Matter of Malpica-Orsini,* 36 N.Y. 2d 568, *appeal dismissed, January 12, 1976, sub nom. Orsini v. Blasi,* 423 U.S. 1042.

The Court of Appeals, after hearing argument, affirmed the order of the Appellate Division (43 N.Y. 2d 708, reported in full in Appellant's Appendix, p. 45) and dismissed the appeal citing its earlier decision in *Matter of Malpica-Orsini, supra.* That case also involved an unmarried father's objections to an adoption by the natural mother and stepfather (discussed *infra*). This court in dismissing the appeal in *Orsini* stated: "The appeal is dismissed

for want of a substantial federal question. Mr. Justice Brennan and Mr. Justice White would note probable jurisdiction and set the case for oral argument."

As appellees will establish, *infra,* the relative factual considerations which entered into the determination by the Surrogate in this case reveal a less fit and less concerned unmarried father than the unmarried father in *Orsini v. Blasi, supra;* indeed the proof reveals a parent on a par with the unmarried father in *Quilloin v. Walcott,* ___ U.S. ____, 98 S. Ct. 549, 54 L. Ed. 2d 631 (1978).

ISSUE INVOLVED

The issue involved is whether New York's statute (Domestic Relations Law §111) and New York's decisions construing that statute, unconstitutionally discriminate against unmarried fathers in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

Appellant and *amici curiae* (hereafter "appellants") define the issue as one involving the right of a married father to "veto" an adoption — a right denied to an unmarried father. We shall establish that under New York law there exists no right of veto at all — each, the married father and unmarried father has an equal right to "prevent" the adoption from being approved.

In an adoption by blood-strangers to the child, both married and unmarried fathers, by virtue of New York's modified "flicker of interest" rule which affords primacy to parenthood, wed or unwed, are given equal rights to prevent the adoption.

In an adoption by the natural mother and stepfather, primacy of parenthood is afforded neither married or unmarried fathers. However both have equal rights to establish that their on-going relationship with the child is such as to warrant denial of the petition for adoption in "the best interests of the child." In

short, while inequality appears facially present in the statute, it does not exist at all in its application.

ARGUMENT

It may be observed that very few adoptions are contested by anyone at all including fathers, married or unmarried.*

It appears that most unmarried fathers are unknown, unidentified, undetermined or unconcerned, in which case they are unlikely to prevail in any event; or if concerned, are not entirely adverse to being relieved of the burden of support or potential support.

In consequence, whatever body of law exists, involves the truly or marginally concerned, supportive and fit unmarried father. Such an unmarried father under New York's statute and decisions, will prevail to the same extent as a married father.

Under New York's governing statute and prevailing decisions to equate the term "consent" with the term "veto" as appellants do, is a distortion, unintended of course, of New York law.

I(a)

THE RELEVANT STATUTE; NEW YORK DOMESTIC RELATIONS LAW §111.

This is New York's present statutory provision governing "consents" to adoption.

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* No statistics are available. Surrogate Sobel informed us that of an average of 350 adoptions a year which trafficked through his court, less than 3% were contested. He could recall only four (4) contests by an unmarried father in the past 10 years all involving adoptions by the natural mother and stepfather.

"111. WHOSE CONSENT REQUIRED

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or Surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent; whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three

hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or Surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or Surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or Surrogate in his discretion may direct that the

consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or Surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or

other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child."

Before discussing the quoted statute and its practical application, we make some preliminary observations.

The Present Statute

The above quoted statute although enacted into law at the time of Surrogate Sobel's decision (August 3, 1976) did not become effective until the following January 1, 1977. The statute prior to its amendment is set forth in Appellant's Brief at pp. 5, 6. The "new" statute simply renumbers and reletters the provisions of the "old" statute. The only significant additions are the provisions of subdivision 6 which merely codify existing law by stating the conditions under which the "consent" of any person, including married fathers, may be dispensed with (hereafter "dispensing conditions").

These "dispensing conditions" were added upon the recommendation of the Temporary State Commission on Child Welfare after consultation with the Surrogate's and Family Court Associations as part of a general recodification of laws applicable to child welfare (see L. of 1976, cc. 665, 666, 667, 668, 669). Chapter 665, in compliance with *Stanley v. Illinois* (405 U.S. 645) mandated notice to putative fathers.

Notice

In this case, there is no issue of notice. Appellant was given notice and a three day hearing. We only briefly mention, that

prior to *Stanley v. Illinois* [405 U.S. 645 (1962)] it was the invariable practice of the New York courts to give notice and opportunity to be heard to all unmarried fathers whose identity or whereabouts could be ascertained. After *Stanley*, such notice was given even to the extent of directing publication. Chapter 665 of the Laws of 1976 added Domestic Relations Law §111-a and Social Services Law §384-c both of which mandated notice to every unmarried father in any kind of proceeding leading to adoption.

Dispensing Conditions

Subdivision 1(b) of the New York Domestic Relations Law, §111, requires the "consent" of a married father.

Subdivision 2(a) defines the conditions under which his "consent" may be dispensed with.

Subdivision 6, the "dispensing conditions" merely codifies former decisions under which such "consent" may be dispensed with. We briefly observe and comment on these "dispensing conditions".

(a) Ability of the father to visit and communicate with his child is presumed. In the absence of proof of visitation and communication or that such visitation or communication was discouraged, "consent" will be dispensed with.

(b) Evidence of insubstantial or infrequent visitation or communication is sufficient as a matter of law to dispense with consent.

(c) Mere expressions of interest and concern for the child unsupported by affirmative evidence of such conduct, justifies dispensing with consent.

(d) Evidence of only intermittent or spasmodic financiai support, or none at all, justifies a court in dispensing with consent.

As noted, these four "dispensing conditions", each sufficient of itself, represents the accumulated experience and decisions of the courts in dispensing with consent.

When a petition for adoption, whether by blood-strangers or by natural mother and stepfather is presented to the court, it must either be accompanied by the married father's consent or must allege one or more of the "dispensing conditions". This is a "jurisdictional" requirement.

Under the relevant statute, experience of the courts at adoption hearings establishes that the "dispensing conditions" are invariably present. This is so simply because hearings on adoptions, whether by blood-strangers or by the natural mother and stepfather, are not scheduled until the adoptive child has been with the adoptive parents for a considerable period of time sufficient to establish the fitness of the adoptive family unit or the solidity and durability of the "new" marriage. However "concerned" the objecting father may be for his child, he rarely maintains the frequency of visitation and communication or the substantial support required by the dispensing conditions.

With regard to the married father, the hearing is simply a two step procedure, first dispensing with consent and next moving on to the determination of "the best interests of the child."

It is in the above sense that the statutory requirement of the "consent" of a married father simply cannot be equated with a "veto" power. If there is a truly concerned and supportive married father, the adoption proceeding will generally never be commenced at all. If one is commenced, the proceeding will ordinarily be disposed of in the first step by the court refusing to dispense with his consent since in any event, he would prevail in

the second step. This is not a power to "veto" — it is a substantive determination that adoption is not in "the best interests of the child."

The great majority of cases however involve only the "marginally" concerned and supportive married father or one who professes to be so concerned. In such a case, the court will as a first step, dispense with his consent under the "dispensing conditions" and move on to the substantive determination of "the best interest of the child." The married father has no power of "veto".

We repeat, neither by the implicit terms of the statute or in its practical operation, does a married father exercise an absolute power to "veto" an adoption. In every case where the married father prevails to prevent the adoption, there will have been an express substantive determination that the adoption is not in "the best interests of the child."

In the case of an unmarried father, whether the adoption is by blood-strangers or by the natural mother and stepfather, the petition under the relevant statute need not annex the unmarried father's "consent" or allege the existence of the "dispensing conditions".

In the practical operation of the statute the omissions of the "consent" and the allegations of the "dispensing conditions" in the petition are merely omissions of jurisdictional predicates. The hearing instead of being a two step proceeding as in the case of a married father becomes a one step proceeding. The court proceeds immediately to the determination of the substantive issue of "the best interests of the child."

It is a misconstruction of the relevant statute to contend, as do all the appellant's briefs, that the unmarried father does not have a "veto" power over the adoption. Under New York law, the unmarried and married father have precisely equal rights to

prevent the adoption, or as appellants say it, to "veto" the adoption, in the court's determination of the substantive issue of "the best interests of the child."

We establish this contention in our discussion next of the New York standard of "the best interests of the child."

I(b)

UNDER THE NEW YORK STANDARD OF THE BEST INTERESTS OF THE CHILD, THE RIGHTS OF MARRIED AND UNMARRIED FATHERS TO PREVENT ADOPTION ARE PRECISELY EQUAL.

Both the married father and the unmarried father have precisely the same substantive rights under the New York decisions applicable to "the best interests of the child" to prevent (or as appellants say it, to "veto") the adoption of their children.

We emphasize that such substantive rights to prevent the adoption exist irrespective of the presence or absence of the "dispensing conditions". These dispensing factors — that he may not have visited or supported the child to the minimal extent justifying dispensing with "consent" — do not deprive either the married father or the unmarried father of his substantive right to prevent the adoption "in the best interests of the child". The degree of his lack of concern are of course considerations in the determination of that substantive issue, but such considerations apply equally to the married and unmarried father.

In short under "the best interests of the child" standard there is no presumption whatsoever that the unmarried father is "unfit" and that the married father is "fit".

We discuss the application of the New York standard in the context of the nature of the adoption proceeding — those by blood-strangers to the child and those by the natural mother and stepfather.

Rights of Biological Fathers vs. Blood-Strangers

The decisions of the New York courts afford full consideration to the primacy of the father's biological parenthood where the adoptive parents are blood-strangers to the child. Indeed, absent evidence of substantive considerations detrimental to the best interests of the child, controlling consideration is given to the father's biological parenthood.

This, Surrogate Sobel observed in the instant case:

> "When the proposed adoptive parents are both blood strangers to the adoptive child and the objecting putative father is himself proposing to adopt, then a modified 'flicker of interest rule' will be applied" (A27).

The New York "flicker of interest" rule gave absolute primacy of right to a biological father, married or unmarried, who had not been proved to have "abandoned" the child. "Abandonment" could be made out "from a settled purpose to be rid of all parental obligations and to forego all parental rights" (*Matter of Maxwell*, 4 N.Y. 2d 429, 433; *see also Spence-Chapin Adoption Services v. Polk*, 29 N.Y. 2d 196; *Matter of Susan "W" v. Talbot "G"*, 34 N.Y. 2d 76).

The modified "flicker of interest" rule, to which Surrogate Sobel referred in his above quoted opinion, is the result of recent statutory and decisional changes in the applicable rule. It wisely permits considerations of factors of both married or unmarried fathers which may be detrimental to "the best interests of the child."

The modified rule, as was the former rule, is applied to both custody and adoption cases. It is best expressed in a recent decision by Chief Judge Breitel in a custody case, *Matter of*

Bennett v. Jeffreys, [40 N.Y. 2d 546 (1976)]. The reference to "parent" is to any biological parent, married or unmarried.

> "The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent. However, there are exceptions created by extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, an unfortunate or involuntary disruption of custody over an extended period of time. It is these exceptions which have engendered confusion, sometimes in thought but most often only in language.
>
> The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a sub-person over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude (cf. *Goss v. Lopez*, 419 US 565, 574; *Matter of Winship*, 397 US 358, 365; *Tinker v. Des Moines School Dist.*, 393 US 503, 506; *Matter of Gault*, 387 US 1, 47).

* * *

> But neither decisional rule nor statute can displace a fit parent because someone else could do a 'better Job' of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These 'rights' are not so much 'rights', but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so." (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y. 2d 196, 204, *supra*).

Despite the existence of some of the "extraordinary circumstances" in this case, (discussed *infra*) if the contest had been between appellant Abdiel Caban and blood-strangers to his children, there is little doubt that his cross petition to himself adopt, would have been granted. Surrogate Sobel so hinted in his decision.

Under the modified "flicker of interest" rule, absent the "extraordinary circumstances", appellant Abdiel Caban as an unmarried biological father would be afforded precisely equal rights to prevent the adoption as if he were a married father. The primacy of parenthood of both biological fathers would afford both controlling consideration.

In a proceeding for adoption of their children by blood-strangers, there is simply no "inequality" under the relevant statute as construed by the New York decision.

Rights of Biological Father vs. Natural Mother and Stepfather

A first and prime observation is that when a biological father, married or unmarried, opposes an adoption by the

natural mother and stepfather, there exists no issue of primacy of parenthood. The contest is between parent versus parent. Nevertheless, precisely the same considerations enter into the determination of "the best interests of the child" whether the contestant is the married father or the unmarried father. The character, fitness and demonstrated concern of the biological father, whether married or unmarried, are of course, considerations but to be measured against the character, fitness and demonstrated concern of the natural mother and stepfather within the "new" family unit.

Whether the biological father merely seeks to prevent the adoption or cross-proposes to himself adopt, the "rights" of both married fathers and unmarried fathers are precisely equal. There exists no presumption of "unfitness" of either parent. Under New York law the standard of "the best interests of the child" govern the determination of the courts.

We cannot demonstrate by a host of decisions that such equality of consideration exists. For one reason, as heretofore discussed, unmarried fathers do not often oppose adoptions by the natural mother and stepfather. For another reason as this Court suggested in *Stanley v. Illinois,* (*supra,* 405 U.S. at 654) "it may be. . . that most unmarried fathers are unsuitable and neglectful parents" (Stanley was not such a parent but we shall demonstrate in this brief *infra,* that Abdiel Caban was not a suitable parent).

However, one such case, in which the contesting unmarried father was demonstrated to be a suitable and concerned parent, was recently decided by the Appellate Division, Second Department, the very same court which disposed of Abdiel Caban's similar contentions in a brief memorandum. In *Matter of Gerald G.G.* (61 A.D. 2d 521, 403 N.Y.S. 2d 57) that court dismissed a petition for adoption by the natural mother and stepfather upon the objection of a concerned unmarried father, observing:

> "This factual background clearly indicates that the appellant was, at all times, a devoted and concerned parent. In this respect, his conduct stands in stark contrast to that of the father of the child born out of wedlock of *Matter of Malpica-Orsini.* In that case the Court of Appeals rejected a constitutional attack on section 111-a of the Domestic Relations Law by the natural father of a child born out of wedlock and, at the same time, affirmed an order of adoption of that child by the natural mother and the spouse to whom she had recently been wed. In so doing, the court took pains to point out that the record indicated that the natural father had defaulted in mandatory support payments, that he was given to 'violent rages', that he 'tore a telephone off the wall, that he ripped all the electric wires out of the mother's car and threatened to take the child and disappear so the mother could never see her' (*Matter of Malpica-Orsini,* 36 N.Y. 2d 568, 577)."

That decision is a direct and unequivocal refutation of the appellant's contention that an unmarried father does not have the right under New York law to prevent an adoption of his child by either the natural mother and stepfather or by blood-strangers. As the court observed, it is the total "factual background" of the contesting and adopting parties which court must consider in determining "the best interests of the child." In that respect, given the same "factual background," no inequality exists as respects the rights of married fathers versus unmarried fathers and no presumption exists that the former is fit and the latter unfit. The facts of each case, as the decisions of this Court plainly establish, are determinative (*cf. Stanley v. Illinois, supra,* 405 U.S. 645 *with Quilloin v. Walcott,* ____ U.S. ____, 98 S. Ct. 549, 54 L. Ed. 2d 511).

While the New York standard of "the best interests of the child" does not discriminate between married and unmarried fathers, that standard is applied quite differently when the adoption is by blood-strangers and when the natural mother and stepfather seek to adopt her child.

For example, in a contest between a biological parent and blood-strangers, New York has held that factors such as superior economic, educational or social advantages, or comparisons of the degree of love and affection, do not enter into the consideration of "the best interests of the child." *(Matter of Bennett v. Jeffreys, supra,* 40 N.Y. 2d 543, 549; *Spence-Chapin Adoption Services v. Polk, supra,* 29 N.Y. 2d 196, 201). These become important relative considerations in a contest between parent and parent, even when the biological father does not seek custody or adoption, but merely seeks to prevent the adoption. *(Matter of Gerald G.G., supra,* 61 A.D. 2d 521, 403 N.Y.S. 2d 57).

A whole bundle of "rights" must be considered by the courts, including the rights of the biological father, in determining "the best interests of the child."

The natural mother has the "right" to rear her child within her new family unit together with her children of her new marriage. The adopting stepfather has rights flowing from his marriage to the natural mother, who has custody of the child. He has the obligation to give paternal care and guidance to the child as a consequence of such custody. He also has the obligation of support — in this case as in most, without assistance from the contesting father. In the case of an unmarried contesting father, the stepfather has an understandable repugnance to the intrusion into his life of his wife's former paramour.

This Court should not, as the appellant's briefs suggest on alleged constitutional inequality, dismiss the "rights" of the

natural mother and stepfather as though they were unrelated strangers having neither rights or obligations toward the child.

The adoptive child has "rights" too! Primary among these is the right to be raised within a single family unit with other children of the new family and without distinction among them, at home or in school.

Also, as the Surrogate mentioned in his decision in this case since the contesting father cannot hope to receive custody or himself adopt, the adoptive child has a right not to be left "in limbo" status. Surely this Court may not ignore the practical experience of all courts with children torn between two families and two fathers. Existing antagonisms are multiplied by new antagonisms from shared visitation and the concomitant shared obligation to support — if support is available from the contesting father. (It was not in the instant case!) It is observed in the latter regard that often a denial of a petition for adoption, if conditioned by an order for support by the contesting father, will result in his "consent" to the adoption.

As discussed, a bundle of rights enter into the determination of "the best interests of the child" when an adoption by the natural mother and stepfather is opposed by the biological father married (divorced) or unmarried.

No court, at least in New York, has spelled out all the considerations which enter into the determination of "the best interests of the child" in a parent vs. parent contest. We suggest a few:

The love, affection and other emotional ties existing between the competing parents and the child;

The relative future capacities of the competing parents to give the child parental guidance and education;

The relative capacities of the competing parents to supply the child with material needs including medical and educational needs (in this regard, as in this case, a court is required to give consideration to the respective earning capacities, home atmosphere and the number of other dependents of the competing parents);

The length of time the child has lived with one parent and been separated from the other parent;

The solidity and permanence of the competing family units;

The existing home, school and community record and associations of the child;

The age of the child and the reasonable preferences, if any, of the child between the competing parents;

The potential psychological effect upon the child of alternative decisions;

The relative character, fitness and concern for the child of the competing parents.

We turn next to the consideration of these and other factors which entered into the Surrogate's determination to grant the petition of the mother and stepfather of these children in this case. We observe that the evidence of appellant's character, fitness and concern for his two children, does not match in any substantial degree, his description in appellant's briefs as a fit and concerned parent. This "fudging" of the record, however well-intentioned to obtain a precedental ruling on an important constitutional issue from this Court, should not result in overruling a totally justified factual determination by the New York courts.

I(c)

COUNTER-STATEMENT OF FACT

In 1968 Maria Mohammed, just 18 years old and Abdiel Caban, then 31 years old, entered an out-of-wedlock relationship (R72, 73).

Caban was not divorced from Gloria, his wife, senior to him by eight years. Gloria, whom he had married on December 3rd, 1955, bore him two children Brenda and Janet (R384). At the time of the hearings before the Surrogate's Court of Kings County, State of New York, held on March 19th, 22nd and April 30th of 1976, Brenda was twenty years old; Janet sixteen years old and Caban was the grandfather of Brenda's child, Karen (R385).

Caban left his wife Gloria in 1960 (R388). In answer to the question: "Did you abandon Gloria or did she abandon you?", Caban admitted that he left his wife (R390). When he left his wife Gloria and the two children, Brenda and Janet, obviously then mere infants, Caban had no "special arrangement" with his lawful wife to support her or his children (R390). He made no effort to support his wife; he didn't know whether Gloria was working and he didn't care (R393). Eight years after he left his wife, Caban took up with the eighteen year old Maria (R389).

There is no affirmative evidence on the record that when Caban left his wife and infant children he furnished them with support. However, it was Mrs. Mohammed's testimony that she knew he was married, the father of children and that he did not support them (R77). She further testified that Caban told her that Gloria, his wife, had taken him to Family Court (R78) a circumstance which the appellant denied, claiming no "special arrangement" required him to support Brenda and Janet (R390). Caban's lack of sensitivity or responsibility for his wife patent on the record (R393), undoubtedly influenced the court's decision.

Maria Mohammed gave birth to David Andrew on July 16th, 1969 at the New York Infirmary; Caban did not pay the hospital bill, Maria did. Caban was not present; Maria listed him as the child's father without his assent (R74, R122).

Denise was born on March 12th, 1971 (R78, R82). Caban went to the hospital with the mother but since they were not married and his "coverage" was not useable, Caban "didn't say anything"; he simply left the hospital premises; the mother gave birth under her maiden name. Caban did not pay for the second child's birth as he did not for David Andrew (R82-84).

Three months later as the result of Maria's insistence, Caban allowed himself to be recorded as Denise's father (R85). Counsel for the appellant stipulated on the record that Caban never formally, in any court proceeding, ever acknowledged paternity of David Andrew or Denise (R74, 75).

Maria Mohammed, except for three months after Denise's birth and despite the infancy of the children, was fully employed (R75, 79); three months after Denise's birth, Maria returned to work and she, not Caban resumed her burden to pay all the household bills, rent, gas, electricity; she provided clothing, even the crib or bed for the child/children (R88). Caban gave her no money for rent, utilities or clothing (R88, 89). A family care center provided a babysitter so that Maria could continue working (R93). Mr. Caban's sole contribution was thirty ($30) dollars a week for food for the four persons. Maria prepared his meals as well (R76, 77). The first year of their affair was free of discord; but after that, for the balance of four years, the relationship was unhappy (R179, 180). For the final six months Caban beat her without reason; subjected her to name calling (bitch/fuck); he paid no attention to the children; no longer even bought food (R190).

Maria did not claim that Caban was cruel to the children; there were times when he was affectionate toward them. But he

never spent time with them, took them to the park or any other place. He was nice to them while underfoot (R90, 180).

Although she asked him, Caban never gave Maria any money, instead he would "borrow" from her which he never returned (R193). She was afraid of Caban; he beat her; he was a drunkard and always drinking (R189, 190). In answer to the appellant's counsel's question, ". . .why did you continue to live with him for four years in addition?!", Mrs. Mohammed declared that she felt strapped (trapped?!); that she couldn't really go anywhere (R194) until she met Kazim Mohammed in August of 1973, who knew of her children and who made a home for her and the children in December of 1973 (R93). He married Maria on January 30th, 1974 and fathered a child by her, Stephan Kazim Mohammed, born on December 17th, 1975 (R109). Maria did not tell Caban of the marriage. She feared that he would make trouble for her and her husband. Caban knew at all times where she was employed. He phoned her there frequently, notably to pay bills for the apartment where he continued to reside (R97, 98, 102, 399).

During the greater part of their relationship Maria and Caban lived one floor below her mother's apartment (R72, 198, 199). Maria's mother saw the children every weekend; Maria would bring the children to her or the grandmother would pick them up at Maria's home (R200, 201).

Because Caban continued to occupy the apartment one flight below the home of Maria's mother (R419), he continued to see the children who visited with her each weekend (A28; R201). The appellant contended that Maria brought the children to his home, personally delivered them most of the time and on Sunday following would pick them up either at his, or her mother's home (R411, 412). Earlier, however, Mr. Caban testified that he never had contact with Mrs. Mohammed (Maria) between the time she left him with the children and October of 1974 except by occasional telephone calls to her

office (R399). Caban's allegations that he saw the children each weekend for six months were truly convenient; without the burden of support he need only walk a few steps to do so. At any rate, between January and September of 1974 when he alleged that he saw the children each weekend for six months (A28; R99, 345-350) he never inquired of their mother or grandmother whether the children needed financial help; nor did he ever give them a gift (R203, 204).

Early in September of 1974 the grandmother, Delores Gonzalez planned to return to Puerto Rico; Maria, Kazim and she agreed that the children would leave with her; that Maria and Kazim, who planned to make their permanent home in Puerto Rico in the future, would remain behind until they earned sufficient money to join the children and establish their permanent home (R101, 104, 207).

Before she left for Puerto Rico on September 7th, 1974 the grandmother informed Caban of their plans. He was neither angry or upset. He offered no objections (R212, 213).

While the children remained with their grandmother in Puerto Rico (September, 1974 through November, 1975) Maria and Kazim alone supported the children by sending bi-weekly sums, visited the children in May of 1975 and regularly communicated with them by mail or telephone (R104, 105, 207, 212).

Caban neither communicated with the children or sent them any funds though he knew where they lived near his own parents (R211, 212).

The appellant denied that he was told the children had left for Puerto Rico until he learned in October of 1974 from his own parents, that they were there. Even if true, (although he testified at an earlier time that Maria told him so at the end of June or early July of 1974) the fact remains that from October,

1974 to November, 1975 Caban neither communicated with the children or sent any funds, however small, for their support (R211, 212). Maria testified that although he telephoned her at her place of employment, he never once inquired as to the children's welfare (R413-415).

During this period and quite expeditiously Caban obtained a divorce in June of 1974. He met his present wife Nina Caban in July of 1975 (R402) and took up residence with her and her two children. On December 16, 1975 he married Nina (R403) and they and her two children took up residence in a three room apartment (R436). At this stage Caban had fathered four children and assumed obligation with regard to two others of his wife.

Caban consulted his attorney sometime during September or October 1975 and told him about the children. In November 1975, some eighteen months after he had last seen or talked with the children, he went to Puerto Rico (R420). While there he caused his mother, under a pretext, to invite the children to his parents' home. On Friday November 14th, 1975 without leave from the maternal grandmother, he "snatched" (the Surrogate's own words) from their grandmother and absconded with them to his present wife, Nina's home. He was not yet married to Nina.

Caban left not an address, but only a telephone number with his own mother. His mother gave the phone number to Maria's mother who promptly phoned Maria and Kazim in New York (R219).

The next day Maria applied to the Family Court for assistance. She was informed that the court was helpless unless she could supply an address for the children. She obtained such an address from the business office of the telephone company. On November 24th, 1975 she found the children in the custody of Nina, a total stranger to the children. After a street quarrel and a ruse described by the Surrogate:

> "Their attempts with the aid of police to regain custody was frustrated again by the removal of the children to a new address. A proceeding in the Family Court resulted in temporary custody being awarded to the mother. The hearings have been adjourned pending the outcome of these adoption proceedings" (A29).

Upon this brief statement of the facts, it is obvious that if the relevant statute (DRL §111) had provided for the "consent" of the unmarried father, the court would have dispensed with the consent of appellant Abdiel Caban under the "dispensing conditions" of subdivision 6 of that statute — and been entirely justified in so doing.

Indeed on the basis of such facts it is obvious that the Surrogate was suspicious of the motives of appellant in opposing the adoption —

> "However quite a different situation is presented when the putative father opposes the adoption by the stepfather, married to the natural mother having custody of the child. A putative father opposing such an adoption, without the consent of the natural mother has himself no prospect of adopting the child. His motive in opposing the adoption is therefore an important consideration. As this court has noted, too often the continued interest is not in the child but rather in the natural mother and whether such interest is labelled 'love' or 'hatred' — it really makes little difference — the purpose is to preserve in some manner, however oblique, the dissolved former relationship. Motive is however very difficult for a court to discern for often the objecting father is not himself consciously aware of it" (Appellant's Appendix, pp. 27, 28).

The Surrogate, confronted with an unmarried father who had fathered four children and now on a modest salary had undertaken the obligation to support a new wife and her two infant children, and with a father who had been only marginally concerned when convenient but totally unsupportive to the adoptive children — moved directly to the determination of "the best interests of the children". He found the marriage of the natural mother to the stepfather to be "solid and permanent" and the children "well cared for and healthy".

Children are not self-supporting. Their survival depends on parents. The Surrogate found that these children's "best interests" required granting the adoption and dismissing the objection of the unmarried father. However the appellant's briefs distort the character, fitness and concern of this unmarried father, the Surrogate in approving the adoption, justifiably found him unfit, unconcerned and unsupportive.

No different result could have followed if the "consent" of this unmarried father was required by the relevant statute, or indeed if he had been a married (divorced) father.

II.

STANLEY V. ILLINOIS IS TOTALLY IRRELEVANT TO THE ISSUES IN THIS CASE.

A first and prime observation is that *Stanley v. Illinois* (405 U.S. 645) involved a contest over custody of his children by an unmarried father, who had lived with and supported his children during a period of 18 years. The protagonists were the Father vs. the State.

Not involved were the rights of an unmarried father to prevent an adoption by blood-strangers to the child.

Not involved, as in the instant case, were the rights of an unmarried father to prevent an adoption by the natural mother

and stepfather of his children. In *Stanley*, the mother was deceased.

Nor, we observe, unlike *Stanley*, is there any issue of procedural due process raised in this case. Under the relevant statute (DRL §111) set forth in full at pages 5, 6 of Appellant's Brief, the Surrogate had discretion to order "notice" to Caban which he did. It is not contested that Caban was given a full and complete three day hearing by the court. *Stanley* was offered neither "notice" nor a "hearing".

Nor, we contend, is there any issue in this case of substantive due process.

This Court, after examining *Stanley* found that "Illinois law affords him no priority in adoption proceedings" and that it was made to appear "that Stanley, unmarried and impecunious, as he is, could not now expect to profit from adoption proceedings."

We repeat, the New York courts have afforded, except in "extraordinary circumstances", controlling consideration to the primacy of biological parenthood both in custody and adoption proceedings. The latest expression of that principle is in *Matter of Bennett v. Jeffreys, supra*, 40 N.Y. 2d 543, 548, 549:

> "But neither decisional rule nor statute can displace a fit parent because someone else could do a 'better job' of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These 'rights' are not so much 'rights', but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances,

parents are generally best qualified to care for their own children and therefore entitled to do so (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N Y 2d 196, 204, supra).

Indeed, as said earlier, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity (see *Stanley v. Illinois*, 405 U S 645, 651, supra, in which the principle is plainly stated and stressed as more significant than other essential constitutional rights).

But where there is warrant to consider displacement of the parent, a determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry. Extraordinary circumstances alone do not justify depriving a natural parent of the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child.

* * *

The child's 'best interest' is not controlled by whether the natural parent or the nonparent would make a 'better' parent, or by whether the parent or the nonparent would afford the child a 'better' background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection between the child and those who vie for its custody. Instead, in ascertaining the child's best interest, the court is guided by principles which reflect a 'considered social

judgment in this society respecting the family and parenthood'. (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N Y 2d 196, 204, supra)."

As the court above noted, the fact that the relevant statute (DRL §111) does not require, as a condition precedent, the "consent" of an unmarried father, "is only the beginning not the end of the judicial inquiry." Extraordinary circumstances (like the "dispensing conditions"), *supra*, alone do not justify denying a natural parent of the custody of a child. Instead once extraordinary circumstances (like "dispensing conditions") are found, the court must then make the disposition that it is in "the best interests of the child."

Unlike Illinois law, under New York law there is no presumption, express or implied that an unmarried father is unfit. Indeed, like a married father, "impecunious" or not, the presumption is the other way.

Under New York law, Stanley would be awarded custody of his children as a matter of law.

Under New York law, despite the fact that his "consent" to an adoption by blood-strangers would not be required, since "extraordinary circumstances" were not proved to exist Stanley could prevent (or as appellant's briefs put it "veto") such an adoption. Stanley would not have to establish that "he was the most suitable of all" (405 U.S. at 648); he would be afforded priority as a biological parent.

Stanley's wife predeceased the commencement of the proceeding. But if she were living and married and sought to adopt the children, the New York courts would afford Stanley notice and a hearing and would proceed to balance the countervailing interests under the standard of the "best interests" of the children. *Matter of Gerald G.G., supra*, 61 A.D. 2d 521, 403 N.Y.S. 2d 57.

Since under New York law, Stanley would not be denied procedural or substantive due process, he would not be denied the equal protection of the laws guaranteed by the Fourteenth Amendment (405 U.S. at 658, Mr. Justice Douglas not joining in this part of the opinion; Chief Justice Burger and Mr. Justice Blackman dissenting).

We turn to brief mention of Stanley's progeny some of which are cited in appellant's briefs.

Miller v. Miller [504 F.2d 1067 (1974)] was a situation where the natural mother surrendered the child to blood-strangers without notice or consent of the biological father. The court declared the Oregon statute unconstitutional. New York's statutes in the same circumstances, provide for notice and a hearing and absent "extraordinary circumstances", affords priority to the biological father.

People ex rel. Slawek v. Covenant Childrens Home (52 Ill. 2d 20, 284 N.E. 2d 291) concerned an adoption by blood-strangers, with the consent of the natural mother but without notice to the unmarried father. The court directed a hearing upon notice with proper regard to the length of time the child had been with the adoptive parents. Under New York law, the unmarried father would be afforded both notice and a hearing.

Vanderlaan v. Vanderlaan [126 Ill. App. 2d 410, 262 N.E. 2d 87, *vacated and remanded*, 405 U.S. 1051, *rehearing held*, 9 Ill. App. 3d 260, 292 N.E. 2d 145 (1972)] involved a factual situation where the unmarried mother voluntarily surrendered custody to the unmarried father and then demanded a change of custody to herself. On remand from the court, the Illinois court held that an unmarried father is entitled to custody equally with the unmarried mother. New York's Domestic Relations Law §70 provides "In all cases there shall be no prima facie right to the custody of the child in either parent but the court shall determine solely what is for the best interest of the child — and make the award accordingly."

Rothstein v. Lutheran Social Services of Wisconsin (47 Wis. 2d 420, 178 N.W. 2d 56, *vacated and remanded,* 405 U.S. 1051, *on remand,* 59 Wis. 2d 1, 207 N.W. 2d 826) merely decided that an unmarried father's children could not be adopted by blood-strangers without notice and affording him a hearing. On remand the court ordered — "Consent of both the unwed mother and the unwed father or consent of one with the proper termination of the parental rights of the other is necessary." This is precisely what New York law affords both an unmarried and married father. In addition, absent extraordinary circumstances, the unmarried biological father would be afforded priority.

The case of *Adoption of Rebecca B* (68 C.A. 2d 137, 137 Cal. Reptr. 100) is strikingly similar to the instant case. The unmarried father's two children had been adopted by their natural mother and stepfather without notice or hearing to the unmarried father. The unmarried father brought a proceeding to vacate the adoption.

The Appellate Court affirmed an order vacating the adoption on the sole ground that the unmarried father had been denied procedural due process citing *Stanley*. The court held however that in a natural mother and stepfather adoption neither substantive due process or equal protection of the law is denied to the unmarried father by requiring only the consent of the natural mother to such an adoption —

> "Accordingly, we hold that the balance of competing interests justifies the provision for stepparents adoption of an illegitimate child on the basis of the consent of the mother alone." (68 C.A. 3d at 199).

We turn to the consideration of *Matter of Malpica-Orsini, supra* (36 N.Y. 2d 568, 331 N.E. 2d 486, *appeal dismissed,* 423 U.S. 1042) a case strikingly similar to the matter at Bar.

III.

THE DECISION OF THIS COURT IN DISMISSING THE APPEAL IN *ORSINI V. BLASI* SHOULD BE A CONTROLLING PRECEDENT.

The appellees would most respectfully observe, before commenting on *Orsini, supra,* that contrary to the New York Court of Appeals' implied holding, the constitutional issue of due process or equal protection does not at all arise under the relevant statute (Domestic Relations Law §111).

True "consent" of a married father is required and not the "consent" of an unmarried father. But "consent" is only the beginning not the end of the judicial inquiry. Whether "consent" is required, or "consent" dispensed with (subd. 6 of §111) or no "consent" is required, the court in every instance must make a substantive judicial determination, of the "best interests of the child." The difference between married and unmarried fathers lies solely in the jurisdictional allegations of the petition. Both have equal rights to prevent an adoption "in the best interests of the child."

Matter of Malpica-Orsini (36 N.Y.2d 568, 331 N.E. 2d 486, *appeal dismissed sub. nom. Orsini v. Blasi,* 423 U.S. 1042 "for want of a substantial federal question") presented issues similar to those raised on the appeal.

The briefs in *Orsini* are not helpful — each distorts the facts. We garner the facts solely from the decision of the Court of Appeals.

The child in *Orsini* was born on November 16, 1970. Thereafter the unmarried father lived with the mother and the child until June 1972 when she left him. She applied for welfare. She was informed that she could not receive such assistance unless she commenced a paternity and support proceeding. In

such proceeding, the unmarried father acknowledged paternity and was ordered to support the child. The record establishes that support was furnished but to what extent is unclear.

In February 1973 the mother married. An adoption proceeding was commenced in the Family Court, Westchester County. The petition for adoption alleged serious defaults in payment of court-ordered support, violent rages and threats to kidnap the child (36 N.Y. 2d at 577).

We observe parenthetically that the allegations, if true, would warrant a court in dispensing with consent, if consent was required under the statute. We add to this observation that since this present appeal, a few courts have taken the affirmative first step of dispensing with consent of unmarried fathers as a purely precautionary measure [*see e.g., Matter of Benjamin,* ____ M.2d ____, 403 N.Y.S. 2d 877 (decided by the Surrogate of New York County, April 4, 1978)].

Upon presentation of the petition for adoption, the Family Court ordered notice to the unmarried father and scheduled a hearing. It is not clear whether such a hearing was had for the parties stipulated "if the parties were called to testify that the Court would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise its discretion to deny his objections and approve the adoption on the grounds that the overall best interest of the child would warrant it." (36 N.Y. 2d at 577). Presumably the stipulation was purposed to present the constitutional issue as a matter of law.

The Family Court granted the petition for adoption and dismissed the objection. An appeal was taken directly to the Court of Appeals on the constitutional issue.

Disregarding the factual background which may have justified the granting of the petition for adoption in "the best

interest of the child," the Court of Appeals moved directly to the constitutional issue.

That court used a "rational basis" standard although conceding that a stricter standard of judicial scrutiny might be applied. In this regard, we respectfully contend that if indeed there is any issue of equal protection, the least strict standard of scrutiny is required. That court (as well as this Court) was not concerned with the rights of illegitimates *per se* or *inter se* legitimate children. That court (as well as this Court) was not concerned with the stricter standards of scrutiny suggested in the *amici curiae* briefs [*Jiminez v. Weinberger,* 417 U.S. 628 (1974)]; *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Weber v. Aetna,* 406 U.S. 164 (1972); *Levy v. Louisiana,* 319 U.S. 68 (1968)]. Such cases are distinguishable from cases which involve the rights of an unmarried father who, by preventing an adoption seeks only to continue his right of ongoing companionship and visitation with his child.

To sustain the validity of the statutory classification which required "consents" from the married father and unmarried mother but not the unmarried father, the Court of Appeals found (1) that great difficulty would be encountered in the overwhelming majority of cases in obtaining a "consent" from a putative father who is unknown, or from one who is unaware that he is the father or from one who disputes parentage or from one who is simply unconcerned; (2) that putative fathers would withhold their consent not out of concern for the child but out of animosity toward the mother; (3) that adoptive parents generally would be dissuaded from adopting out of fear of subsequent annoyance by the putative father; (4) that the difficulty and delay in obtaining approval of adoptions would increase trauma in the child; (5) that the resultant difficulty in obtaining consents would result in increased expense to authorized agencies and adoptive parents; (6) that black-marketing of children would increase, (7) that marriages would decrease from fear by stepfathers of perpetual annoyance from

the wife's former paramour and (8) that requiring consent from putative fathers would have the overall effect of denying homes to the homeless by impeding the worthy process of adoption. For all these reasons the Court of Appeals concluded —

> "Certainly these facts demonstrate that the classification is reasonable not arbitrary."

We omit comment on the reasons assigned by the Court of Appeals for its determination that the statutory classification is "reasonable not arbitrary", since we contend that both married fathers and unmarried fathers have equal rights under the relevant statute (DRL §111) to prevent an adoption of their children.

We illustrate this by reference to the dissent in the Court of Appeals in *Orsini*. The dissent suggested that the relevant statute would survive constitutional challenge if it provided for the "consent" of both married and unmarried fathers. Other courts with experience and responsibility in these matters have suggested that the requirement be revised "downward" to require the "consent" of neither (*Matter of Tyese*, 83 Misc. 2d 1044, 373 N.Y.S. 2d 447).

Concedely either suggested amendment, whether legislative or judicial, would be preferable to the present statute. But apart from obviating constitutional attack on alleged inequality, neither amendment would change the result in any case — particularly not in this case.

Under the present statute a father, married or unmarried, who has maintained a positive ongoing and supportive relationship with his child (hereafter "concerned father") is, and without doubt should be, allowed to prevent an adoption of his child whether by blood-strangers or the natural mother and stepfather. To deprive any child of the companionship and visitation of such a "concerned father" is *ipso facto* not in "the best interests of the child."

Under the present statute such a married "concerned father" may withhold his consent. At the hearing, the court would refuse to dispense with his consent thereby determining that the adoption is not in "the best interests of the child." This is in effect a two step proceeding under the "best interest" standard.

Under the present statute, an unmarried father's consent is not required. But if it is established at the hearing that he is a "concerned father", the court would necessarily determine that the adoption is not in the best interests of his child. This is in practical effect a single step procedure.

If the "consent" of both married and unmarried fathers was statutorily required, the proceedings would in all cases be a two step procedure. If the "consent" of neither was required, the proceedings in all cases would be a one step procedure

Where the father, married or unmarried, is not a "concerned father" the procedure would be no different under the present statute or under a statute requiring the consent of both or the consent of neither. Consent, if required, would be dispensed with under the "dispensing conditions" of the relevant statute [DRL §111 (subd. 6)]. The court would determine the "best interests of the child" under a two step procedure. If consent was not required of either the married or unmarried father, the court in a single step would determine "the best interests of the child."

The point we make is that the present statute does not discriminate between married fathers and unmarried fathers any more or less than would a statute requiring the "consent" of both or the "consent" of neither.

As we have discussed, the New York standard of "the best interests of the child" is applied differently if the adoption is by blood-strangers or by natural mother and stepfather — but without discrimination between married fathers and unmarried fathers in such application.

Although this Court did not articulate its reasons for dismissing the appeal in *Orsini v. Blasi* (423 U.S. 1042) "for want of a substantial federal question", we believe that this Court recognized that the New York statute (DRL §111) does not in fact or in law discriminate between married fathers and unmarried fathers.

We contend that this appeal raises no federal question at all. The decision and the orders of the Court of Appeals (*Matter of Adoption of David C. and Denise C.*, 43 N.Y. 2d 708) should be affirmed for the same reason the appeal in *Orsini v. Blasi, supra* [423 U.S. 1042 (1975)] was dismissed.

IV.

THE APPELLANT'S SUBSTANTIVE RIGHTS WERE NOT VIOLATED BY THE NEW YORK COURT'S APPLICATION OF A "BEST INTERESTS OF THE CHILD" STANDARD. THIS COURT SHOULD MAKE THE SAME DISPOSITION OF THIS APPEAL AS WAS MADE IN *QUILLOIN V. WALCOTT*.

The facts in *Quilloin v. Walcott* [____ U.S. ____, 54 L. Ed. 2d 511 (1978)] are similar to the facts in this case.

The Georgia statute in *Quilloin* provided for the consent of a married father but not the consent of an unmarried father [Ga. Code Cenn. §74-403 (subds. 1, 2)]. The consent of the married father could be dispensed with under the statute only upon proof of abandonment. Unlike the New York statute [DRL §111 (subd. 6)] the Georgia statute did not contain the "dispensing conditions" which permit the New York courts to dispense with "consent" upon proof of conditions far, far short of abandonment, for example, failure to maintain substantial and frequent visitation and communication and substantial support.

The adoption in *Quilloin* was by the natural mother and stepfather. Factually, the only distinction between *Quilloin* and

this case, was that Quilloin had not lived with the natural mother for any period of time.

This Court affirmed the Georgia courts. On the issue of substantive due process, this Court held:

> "We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 . . . (1977) (Steward, J., concurring). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.'"

In deciding the substantive due process issue, this Court differentiated between an adoption by blood-strangers and an adoption by the natural mother and stepfather. This is a distinction which we have discussed in Part I(b) of this brief (New York Standard of Best Interests of the Child). We have contended further that though that standard is applied

differently where the contest is between parent vs. blood-strangers and parent vs. parent, both married and unmarried fathers are given equal rights to prevent any adoption.

On *Quilloin's* equal protection contention, this Court held:

> "Appellant contends that even if he is not entitled to prevail as a matter of due process principles of equal protection require that his authority to veto an adoption be measured by the same standard that would have been applied to a married father. In particular, appellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently. We think appellant's interests are readily distinguishable from those of a divorced father, and accordingly believe that the State could permissibly give appellant *less veto* authority than it provides to a married father.
>
> Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare 74-202 with 74-105 and 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is of course a central aspect of the marital relationships, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."

We contend of course that New York's relevant statute does not give an unmarried father "less veto authority than it provides to a married father." Nevertheless Caban, except for the period when they lived together, "never shouldered any responsibility with respect to their daily supervision, education, protection or care and never supported the children. Indeed as the Surrogate impliedly recognized he was incapable of doing so even if he sought custody or adoption of his children. The New York courts found that the countervailing interests of the natural mother and her family unit so far overbalanced the alleged fitness, concern and character of Caban as to outweigh by far his professed interest and concern for his children. This was hard and meticulous fact-finding by an experienced judge acting under responsibility in these matters. The court would have reached the same conclusion if Caban were the married (divorced) father of these children.

We believe that *Quilloin v. Walcott* is indistinguishable from the present case. The judgment of the New York courts should be affirmed.

V.

UNDER THE NEW YORK STATUTE THERE IS NO DISCRIMINATION ON THE BASIS OF THE SEX OF THE PARENTS OF ILLEGITIMATE CHILDREN.

Under the relevant statute (DRL §111) there exists no discrimination on the basis of the sex of the parents of illegitimate children.

Such an issue does not even occur when all that an unmarried father seeks is to prevent (or "veto") an adoption — including an adoption by the unmarried mother and stepfather. The statute does not require the "consent" of the unmarried mother in bringing such a proceeding or to prevail in such a proceeding.

It is only when the unmarried father is himself (or with his wife) seeking to adopt his children that the statute requires the "consent" of the unmarried mother. In this case, in order to use the sex discrimination issue, appellant Abdiel Caban and his wife Nina (whom he had married December 16, 1975 during the pendency of the Family Court proceeding and only eleven weeks before his petition) cross petitioned for the adoption of the children (March 8, 1976).

True, for an unmarried father to adopt his children, the "consent" of the unmarried mother is required. But under the statute there is no irrebuttable presumption that the unmarried mother is a fit and concerned parent. For under the express terms of the statute the consent of any "parent" (including an unmarried mother) may be dispensed with under the "dispensing conditions" [DRL §111 (subds. 2(a), 6)] on far less proof than is required to establish abandonment. [*Cf. Matter of Corey L v. Martin L*, 55 A.D. 2d 717, 389 N.Y.S. 2d 428; *Matter of Shannon T*, 87 Misc. 2d 744, 386 N.Y.S. 2d 726 (both recent cases dispensing with "consent" of a married father)]. When a court dispenses with the consent of the unmarried mother, the standard becomes "the best interests of the child." Both the unmarried father and the unmarried mother have equal rights to prevail in their petitions to adopt the child.

It is true also that in a cross contest to adopt their children, the "consent" of the unmarried father is not the end but only the beginning of the judicial inquiry. Not alone may the unmarried father prevent the adoption (which is not the issue under discussion) but he may prevail in his petition for adoption if the

proof, from whatever source produced, establishes that the adoption by the unmarried father is in "the best interests of the child." The statute does not deny that right to the unmarried father, as appellants contend, — it, in law, grants that right to the same extent that it grants that right to the unmarried mother.

It is undoubtedly true that in cross contests for adoption between the unmarried mother and the unmarried father, the courts have invariably favored the unmarried mother. But this is not because of any presumptions in the statute or because of any provisions in the statute but instead simply because in such a contest the surrounding facts and circumstances invariably favor the unmarried mother (A30).

The unmarried mother has given birth to the child. Invariably the child will remain continuously in her custody. From such circumstance, there is rarely an issue of "insubstantial or infrequent visits or communication" [subd. 6(a)] to the extent that the unmarried father has not been fully supportative or not supportive at all, the unmarried mother has fulfilled her obligation to support the child [subd. 6(a)].

For these factual reasons (and not because of any provision of the statute) we cannot cite any decision in New York where the unmarried father has prevailed in a cross petition for adoption over the petition of the unmarried mother. But this is not, we repeat because of any presumptions or provisions of the statute.

For the foregoing reasons, we do not enter into any discussion or citations of this Court's decision dealing with sex or gender based discrimination. The decisions of the New York courts below did not discuss it. The Surrogate in his opinion disdained to give even mention to the cross petition of the Cabans' on the basis of the obvious unfitness of the cross petitioners' new and untested family unit to assume any additional obligations for these two adoptive children.

We respectfully contend that for the same reasons, this Court need not concern itself with any sex discrimination in this case. It did not in either *Stanley, Orsini* or *Quilloin, supra.*

CONCLUSION

For all of the foregoing reasons the judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

s/ Morris Schulslaper
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